
IN THE SUPREME COURT OF MISSOURI
EN BANC

STATE OF MISSOURI EX REL. ATMOS ENERGY CORPORATION, et al.,	)	
Appellants,	)	
vs.	)	**Case No. SC84344**
PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI, et al.,	)	
Respondents.	)	
and	)	
AMEREN CORPORATION and UNION ELECTRIC COMPANY, d/b/a AmerenUE,	)	
Appellants,	)	
vs.	)	
PUBLIC SERVICE COMMMISION OF THE STATE OF MISSOURI, et al.,	)	
Respondents.	)	

Appeal from the
Circuit Court of Cole County, Missouri
19th Judicial Circuit

BRIEF OF APPELLANTS AMEREN CORPORATION AND UNION ELECTRIC COMPANY, D/B/A AMERENUE

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This appeal arises from Public Service Commission ("PSC") orders issuing rules governing various aspects of certain public utilities' businesses. Those orders were upheld by the Circuit Court of Cole County in proceedings for review brought pursuant to MO. REV. STAT. § 386.510. The case was appealed to the Missouri Court of Appeals, Western District, pursuant to MO. REV. STAT. § 386.540, and the Court of Appeals dismissed the appeal on jurisdictional grounds. This Court ordered transfer of the appeal on April 23, 2002.

This appeal involves issues regarding the jurisdiction of the circuit court and the court of appeals in reviewing orders of the PSC. This appeal also involves questions of whether the PSC exceeded its statutory authority and the limits of its jurisdiction in issuing the orders promulgating PSC rules that, among other things, purport to deem certain acts of a public utility to be unlawful without adjudication. This Court has jurisdiction to hear this appeal under MO. CONST. ART. V, §§ 3 and 10.

STATEMENT OF FACTS

On April 26, 1999, the Public Service Commission ("PSC") filed proposed rules with the Secretary of State (the "Proposed Rules"), and cited as authority MO. REV. STAT. §§ 386.250 and 393.140 (2000)[1] (L.F. 17-27; 496-506; 686-696; 1015-1026). The Proposed Rules contained requirements applicable to regulated electric utilities, regulated steam heating utilities, and regulated gas utilities subject to the jurisdiction of the PSC. *Id.* Among the provisions of the Proposed Rules were so-called "asymmetrical pricing standards" prohibiting certain transactions between a utility and its affiliates unless the mandated pricing standards contained therein are met. *Id.*

Appellant Ameren Corporation is the parent company of Appellant Union Electric Company d/b/a AmerenUE ("UE") (L.F. 170; 1311). UE is a regulated investor owned utility company subject to the jurisdiction of the PSC. *Id.* UE is an electric and gas utility and an electrical corporation and a gas corporation within the meaning of MO. REV. STAT. §§ 386.020(15) and 386.020(18).[2] Ameren Corporation is the unregulated parent corporation of UE, and under the Proposed Rules (and the rules ultimately

[1] All statutory references are, unless otherwise noted, to MO. REV. STAT. (2000).

[2] When the PSC proceedings commenced in April, 1999, UE was also a steam heating utility that would have been subject to the rules proposed for steam heating utilities. UE has since retired its steam heating utility plant, and no longer has any such plant in service.

adopted) is considered an "affiliated entity" of UE (*See, e.g.*, L.F. 462). Ameren Corporation is not an electrical corporation or a gas corporation and is not subject to PSC jurisdiction. (L.F. 1311). Ameren Corporation is a registered holding company under the Public Utility Holding Company Act of 1935 ("PUHCA").[3] As such, it and its affiliates are subject to regulation by the Securities and Exchange Commission (L.F. 167-68; 170-71).

On June 1, 1999, the Proposed Rules were published in the *Missouri Register*. The PSC then commenced rulemaking proceedings in PSC Case Nos. EX-99-442, HX-99-443, GX-99-444 and GX-99-445 (L.F. 1; 479; 670; 997). Case No. EX-99-442 applies to electric utilities, Case No. HX-99-443 to steam heating utilities, and Case Nos. GX-99-444 and GX-99-445 to gas utilities. *Id.* Numerous utilities objected to the manner in which the proceedings were being conducted (L.F. 140-41; 467-469; 546-557). The utilities' procedural objections were based on claims that the PSC's statutory authority to issue the subject rules requires the PSC to hold a hearing giving affected parties, among other things, the right to cross-examine or rebut opposing witnesses. *Id.*

The PSC denied requests to allow, among other things, cross-examination and rebuttal of opposing witnesses (L.F. 443; 476). The PSC ordered that "comments" could be submitted, and held public "hearings" on September 13, 14, and 15, 1999. At these

[3]Ameren Corporation was formed as a result of a merger that became effective in January of 1998 between UE and Central Illinois Public Service Company ("CIPS").

hearings, witnesses were sworn and questioned, but the only questions allowed were those from members of the PSC and the PSC's administrative law judge (Tr. 2).

On November 16, 1999, by a vote of four to one, the PSC issued Orders of Rulemaking (the "Orders) in each of the above-cited PSC cases (L.F. 471; 664; 991; 1261). In issuing the Orders, the PSC enacted the rules that are the subject of this appeal (the "Rules"). *See* 4 C.S.R. 240-20.015, 240-40.015, 240-40.016, and 240-80.015.

As required in MO. REV. STAT. § 386.510, Appellants timely filed applications for rehearing with the PSC after the Orders were issued (L.F. 467; 650; 977; 1256), which applications were denied by the PSC on January 11, 2000. Appellants' applications for rehearing challenged the Orders on numerous grounds, including that the Orders exceeded the PSC's statutory authority and jurisdiction, failed to afford certain required evidentiary procedures (e.g. cross examination of witnesses), and deemed certain acts of the utility to be unjustly discriminatory and unduly preferential without first conducting an adjudication and therein making the required factual findings supporting such a determination as required by the statutes governing the exercise of the PSC's jurisdiction. *Id.* Appellants timely sought review, pursuant to MO. REV. STAT. § 386.510, in the Circuit Court of Cole County, renewing all grounds from the applications for rehearing (L.F. 1276). Other parties to the PSC proceedings also sought review. Upon motion by all Relators, on February 25, 2000, the Circuit Court of Cole County ordered a stay delaying the effectiveness of the Rules pending final judicial review of the Orders (L.F. 1312).

After briefing and argument, by Order and Judgment dated September 11, 2000, the Circuit Court affirmed the Orders (L.F. 1303). Upon motion of the Relators, the Circuit Court corrected certain errors relating to the names and status of some of the Relators, and also expressly continued the stay of the Rules pending final judicial review (L.F. 1310).

On October 19, 2000, Appellants timely filed their Notice of Appeal to the Missouri Court of Appeals, Western District (the "Western District"). Atmos Energy Corporation, Missouri Gas Energy, a division of South Kansas City Energy Corporation, and Laclede Gas Company (the "Atmos Appellants"), filed a separate appeal. The Western District consolidated the appeals. Appellants and the Atmos Appellants jointly filed the Record on Appeal consisting of a substantial part of the record from the PSC's proceedings, including the transcript of the public hearings held before the PSC. All parties to the consolidated appeals, including intervenor Office of the Public Counsel, filed briefs, and oral arguments were held before a panel of the Western District on May 15, 2001.

The Western District dismissed the consolidated appeals in its first opinion filed December 26, 2001 (the "First Opinion").[4] As grounds for such dismissals, the Western District held that both it and the Circuit Court lacked jurisdiction to hear the appeals, finding, *inter alia*, that the phrase "order or decision" in Sections 386.500 and 386.510 referred solely to orders or decisions arising from a complaint proceeding initiated under

[4] The First Opinion is attached hereto as Appendix A.

MO. REV. STAT. § 393.390. First Opinion at 14; App. A at A-14. Because the Orders did not arise from such a complaint proceeding, the Western District found that review under Sections 386.500 and 386.510 was improper, and that the Circuit Court and the Western District therefore lacked jurisdiction. *Id.* The Western District therefore held that any review of the Orders must be via a declaratory judgment filed pursuant to MO. REV. STAT. § 536.050. First Opinion at 17; App. A at A-17.

Appellants and the Atmos Appellants timely requested rehearing or, in the alternative, transfer to this Court, questioning on substantive grounds numerous contentions in the First Opinion. The PSC moved for clarification or, alternatively, rehearing, also questioning the substance and effect of the First Opinion. Appellants' Suggestions in Support of Motion for Rehearing or, in the Alternative, for Transfer to the Supreme Court of Missouri are attached hereto as Appendix B. The Atmos Appellants' Motion for Rehearing and Suggestions in Support Thereof is attached hereto as Appendix C. The PSC's Motion for Clarification or in the Alternative Motion for Rehearing is attached hereto as Appendix D.

Approximately two months later, on March 5, 2002, on its own motion and without addressing the contentions raised in the aforementioned motions for rehearing or applications for transfer, the Western District summarily overruled such motions, denied such applications, and issued a new opinion, modified on its own motion (the "Second Opinion"). The Second Opinion is attached hereto as Appendix E. The Western District again dismissed both appeals for lack of jurisdiction, still concluding that Sections

386.500 and 386.510 did not apply to any review of PSC orders promulgating rules and that the exclusive avenue for judicial review of such orders is a declaratory judgment action pursuant to Section 536.050. Second Opinion at 23-24; App. E at E-23-E-24.

Appellants and the Atmos Appellants timely filed Applications for Transfer to this Court. By Order dated April 23, 2002, this Court sustained the foregoing Applications for Transfer and ordered that these appeals be transferred to this Court.

POINTS RELIED ON

I. THE COURT OF APPEALS, WESTERN DISTRICT, ERRED IN DISMISSING APPELLANTS' APPEAL FOR LACK OF JURISDICTION ON THE GROUNDS THAT THE ORDERS PROMULGATING THE RULES AT ISSUE IN THE PRESENT APPEAL WERE NOT "ORDERS OR DECISIONS" WITHIN THE MEANING OF THE PSC LAW AND WERE THEREFORE NOT SUBJECT TO JUDICIAL REVIEW THEREUNDER IN THAT (A) THE PLAIN AND ORDINARY MEANING OF THE STATUTORY LANGUAGE "ANY ORDER OR DECISION" CONTAINED IN SECTION 386.510 INCLUDES THE ORDERS AT ISSUE IN THE PRESENT APPEAL, MAKING SUCH ORDERS SUBJECT TO REVIEW IN THE CIRCUIT COURT UNDER SECTION 386.510, AND THEREAFTER IN THE APPELLATE COURTS OF THIS STATE UNDER SECTION 386.540; AND (B) THE WESTERN DISTRICT'S DISMISSAL OF THE PRESENT APPEAL AND ITS OPINION THAT JUDICIAL REVIEW IS ONLY AVAILABLE WITH RESPECT TO THE SUBJECT ORDERS UNDER SECTION 536.050 DEFEATS THE PURPOSES OF THE PSC LAW AND THE LEGISLATIVE INTENT REFLECTED THEREIN.

Emery v. Wal-Mart Stores, Inc., 976 S.W.2d 439 (Mo. banc. 1998).

State ex rel. Southwestern Bell Tele. Co. v. Pub. Serv. Comm'n, 592 S.W.2d 184 (Mo. App. W.D. 1979).

Union Electric Company v. Clark, 511 S.W.2d 822 (Mo. 1974).

State ex rel. Cirese v. Ridge, 138 S.W.2d 1012 (Mo. banc. 1940).

MO. REV. STAT. § 386.130

MO. REV. STAT. § 386.270

MO. REV. STAT. § 386.500

MO. REV. STAT. § 386.510

MO. REV. STAT. § 386.515

MO. REV. STAT. § 393.140(3)

MO. REV. STAT. § 393.140(4)

MO. REV. STAT. § 393.140(8)

MO. REV. STAT. § 394.312

II. THE PSC ERRED IN ISSUING THE ORDERS THAT CREATED THE RULES BECAUSE THE RULES EXCEED THE PSC'S LEGISLATIVE AUTHORITY IN THAT THE "ASYMMETRICAL PRICING" STANDARDS IN THE RULES ADJUDGE ACTS OF A PUBLIC UTILITY TO BE UNREASONABLE, UNJUST, UNJUSTLY DISCRIMINATORY OR UNDULY PREFERENTIAL WITHOUT ADJUDICATION AS REQUIRED BY MO. REV. STAT. § 393.140(5).

State ex rel. Utility Consumers Council of Missouri, Inc. v. Pub. Serv. Comm'n, 585 S.W.2d 41 (Mo. banc 1979).

State ex rel. General Telephone Co. v. Pub. Serv. Comm'n, 537 S.W.2d 655 (Mo. App. W.D. 1976).

State of Missouri ex rel. Southwestern Bell Tel. Co. v. Pub. Serv. Comm'n, 262 U.S. 276, 43 S.Ct. 544 (1923).

State ex rel. Associated Natural Gas Co. v. Pub. Serv. Comm'n, 954 S.W.2d 520 (Mo. App. W.D. 1997).

15 U.S.C.S. § 79m(b) 1998.

MO. CONST., ART. V, § 18.

MO. REV. STAT. §§ 386.570-386.600

MO. REV. STAT. § 393.140(5)

MO. REV. STAT. § 536.010(2)

MO. REV. STAT. § 536.140.2(3)

III. THE PSC ERRED IN ISSUING THE ORDERS THAT CREATED THE RULES BECAUSE THE PROCESS FOLLOWED IN ISSUING THE ORDERS AND THE RESULTING RULES VIOLATED MO. REV. STAT. § 386.250(6) IN THAT APPELLANTS, AS AFFECTED PARTIES, WERE DENIED THE RIGHT TO PRESENT EVIDENCE AND TO CROSS-EXAMINE AND REBUT OPPOSING WITNESSES AT AN EVIDENTIARY HEARING.

Brown Group, Inc. v. Admin. Hearing Commission, 649 S.W.2d 874 (Mo. banc. 1983).

State ex rel. Kansas City Public Service Co. v. Waltner, 169 S.W.2d 697 (Mo. 1943).

MO. REV. STAT. § 386.250(6)

MO. REV. STAT. § 386.500

Neely, *Administrative Practice and Procedure* (2d ed. 1995).

ARGUMENT

I. THE COURT OF APPEALS, WESTERN DISTRICT, ERRED IN DISMISSING APPELLANTS' APPEAL FOR LACK OF JURISDICTION ON THE GROUNDS THAT THE ORDERS PROMULGATING THE RULES AT ISSUE IN THE PRESENT APPEAL WERE NOT "ORDERS OR DECISIONS" WITHIN THE MEANING OF THE PSC LAW AND WERE THEREFORE NOT SUBJECT TO JUDICIAL REVIEW THEREUNDER IN THAT (A) THE PLAIN AND ORDINARY MEANING OF THE STATUTORY LANGUAGE "ANY ORDER OR DECISION" CONTAINED IN SECTION 386.510 INCLUDES THE ORDERS AT ISSUE IN THE PRESENT APPEAL, MAKING SUCH ORDERS SUBJECT TO REVIEW IN THE CIRCUIT COURT UNDER SECTION 386.510, AND THEREAFTER IN THE APPELLATE COURTS OF THIS STATE UNDER SECTION 386.540; AND (B) THE WESTERN DISTRICT'S DISMISSAL OF THE PRESENT APPEALS AND ITS OPINION THAT JUDICIAL REVIEW IS ONLY AVAILABLE WITH RESPECT TO THE SUBJECT ORDERS UNDER SECTION 536.050 DEFEATS THE PURPOSES OF THE PSC LAW AND THE LEGISLATIVE INTENT REFLECTED THEREIN.

STANDARD OF REVIEW

With respect to the issues relating to the jurisdiction of the circuit courts or court of appeals to review the PSC's decision as discussed in this Point I, this Court may

finally determine the issues in this case, just as if in an original appeal. MO. CONST. ART. V, § 10, MO. R. CIV. P. 83.09. As the highest court in this state, this Court's decisions are controlling in all other courts. MO. CONST. ART. V, § 2. Therefore, this Court is entitled to determine its own jurisdiction over this appeal.

INTRODUCTION

The Western District's decision in this appeal is a radical departure from more than 89 years of jurisprudence governing judicial review of PSC actions, employing a novel interpretation on the clear and unambiguous language of Sections 386.500 and 386.510. If adopted, the Western District's conclusion would effectively overrule this Court's decision in *Union Electric Company v. Clark*, 511 S.W.2d 822 (Mo. 1974), and represents an abrupt departure from the Western District's own prior decisions in cases such as *State ex rel. Southwestern Bell Tele. Co. v. Pub. Serv. Comm'n*, 592 S.W.2d 184 (Mo. App. W.D. 1979); *State ex rel. Glendinning Cos. of Conn., Inc. v. Letz*, 591 S.W.2d 92 (Mo. App. W.D. 1979); and *Jefferson Lines Inc., v. Pub. Serv. Comm'n*, 581 S.W.2d 124 (Mo. App. W.D. 1979).

The mechanism for direct judicial review enacted by the legislature in the statutes relating to the PSC and its regulation of public utilities ("PSC Law")[5] (Sections 386.500 *et seq*.) is the exclusive mechanism for review of all PSC orders, including those issued with respect to PSC rules. This is true for several reasons, including that (a) the plain

[5] L. 1913, p. 557; *See also*, the Revisor's Note to MO. REV. STAT. § 386.010, which details those sections of MO. REV. STAT. that comprise the PSC Law.

language of the PSC Law mandates that Sections 386.500 *et seq.* should apply to any and all orders or decisions of the PSC, including orders issuing rules; (b) the Western District's conclusion undermines the nature and purpose of the PSC Law itself, which is contrary to the legislature's intent; and (c) this Court's decision in *Clark,* and the Western District's own numerous decisions following *Clark,* dictate that the present appeals were, in the circuit court and court of appeals below, and are, in this Court, reviewable under Sections 386.500 and 386.510.

A. The plain and ordinary meaning of the PSC Law demonstrates that review of the Orders is proper.

1. The courts must regard the phrase "any order or decision" as meaning what it says.

When statutory language is clear, courts must give it effect as written. *Emery v. Wal-Mart Stores, Inc.*, 976 S.W.2d 439, 449 (Mo. banc. 1998). A court has no authority to read into a statute a legislative intent contrary to the intent evident in the plain language. *Id.* A court should regard a statute as "meaning what it says." *Id* (*citing State ex rel. Bunker Resource, Recycling and Reclamation, Inc. v. Dierker,* 955 S.W.2d 931 (Mo. banc. 1997)). If the statutory language is clear, "[t]here is no room for construction even when a court may prefer a policy different from that enunciated by the legislature." *Kearney Special Road Dist. v. County of Clay,* 863 S.W.2d 841, 842 (Mo. banc. 1993). "A court may not add words by implication to a statute that is clear and unambiguous."

Emery, 976 S.W.2d at 449 (*citing Asbury v. Lombardi*, 846 S.W.2d 196 (Mo. Banc. 1993).

The statutes primarily at issue, Sections 386.500 and 386.510, provide in pertinent part as follows:

> 386.500.2 No cause or action arising out of *any order or decision* of the commission shall accrue in any court to any corporation or the public counsel or person or public utility unless that party shall have made . . . application to the commission for rehearing * * * (emphasis added).
>
> 386.510 * * * the applicant may apply to the circuit court . . . for the purpose of having the reasonableness or lawfulness of the original *order or decision* [of the PSC] or the order or decision on rehearing inquired into and determined. * * * No court in this state, except the circuit courts *to the extent herein specified* and the supreme court or court of appeals on appeal, shall have jurisdiction to review, reverse, correct, or annul *any order or decision* of the commission or to suspend or delay the executing or operation thereof, or to enjoin, restrain or interfere with the commission in the performance of its official duties * * * (emphasis added).

There is nothing unclear or otherwise ambiguous about the above-quoted statutory language. As such, the courts are not free to add to or take away words by implication. *Emery*, 976 S.W.2d at 449. There is nothing that remotely suggests that "any order or decision" does not mean what it says – *any* order or decision, or that it somehow excludes

an order or decision of the PSC to promulgate a rule. The language does not provide for review of only *some* orders or decisions, or specify certain types of orders or decisions to which it does or does not apply. Rather, the statutes provide for review of *any* order.

"Order" is defined in *Black's Law Dictionary* (6th ed. 1990) to be "[a] mandate; precept; command or direction authoritatively given; *rule or regulation*." *See also Merriam-Webster Unabridged Dictionary* (2d ed. 1952) (an "order" is "a rule or regulation made by competent authority"). Any reasonable reading of the plain language of the applicable statutes, the application of common sense, and a review of the above-quoted definitions, demonstrate with clarity that what the PSC did in the present cases is issue its orders; its rules; its "direction authoritatively given," that public utilities were to be, after issuance of the Orders, bound by the Rules reflected therein. *See also* MO. REV. STAT. § 386.130, which provides, in pertinent part, that "*every* order and decision made by a commissioner, when approved and confirmed by the commission and ordered filed in its office, shall be deemed to be an order of the Commission" (emphasis added). The Orders at issue were approved and confirmed by the PSC and ordered filed in its office – they are clearly "orders" of the PSC and are reviewable as such under the PSC Law.

The PSC Law itself contains numerous references to the term "order" that make clear that a PSC order includes an order issuing rules and therefore unquestionably are within the meaning of the phrase "order or decision," in Sections 386.500 and 386.510. *See, e.g.*, § 69(3) of the original PSC Law (now MO. REV. STAT. § 393.140(3)) granting the PSC the "power to fix *by order* . . . standards for the measurement of the purity of . . .

of gas" (emphasis added) (The PSC has issued an order adopting such *rules*; *see* 4 C.S.R. 240-10.030). *See also* §69(4) or the original PSC Law (now MO. REV. STAT. § 393.140(4)) giving the PSC the power to prescribe, "*by order*," forms of accounts, records, and memoranda to be kept by utilities, and § 69.9 of the original PSC Law (now MO. REV. STAT. § 393.140(8)) giving the PSC the "power, after hearing, to prescribe *by order* the accounts in which particular outlays and receipts shall be intercharged or credited" (emphasis added).

2. The courts, since the inception of the PSC Law, have universally regarded the phrase "any order or decision" as meaning what it says.

Given the clarity of the statutes at issue, it comes as no surprise that since the enactment of the PSC Law in 1913, every court has applied Sections 386.500 and 386.510 to every single instance of judicial review of any order or decision of the PSC (including those involving PSC rules). *See, e.g., Clark*, 511 S.W.2d 822; *SW Bell*, 592

S.W.2d 184; and *Jefferson Lines, Inc*, 581 S.W.2d 124.[6] In short, these appeals were properly before the Circuit Court and the Western District, and are properly before this Court because the PSC Law provides, in clear, direct, and unambiguous terms, that any order or decision of the Commission is reviewable under Sections 386.500 and 386.510.

The Western District all but concedes that the foregoing statutes are clear and unambiguous. *See* Second Opinion at 11; App. E at E-11 ("As such, giving the critical language of those sections, 'order or decision,' its plain and ordinary meaning, any and all orders and decisions of the PSC, including orders of rulemaking, would arguably be

[6] *See also State ex rel. Pub. Serv. Comm'n v. Dally*, 50 S.W.3d 774 (Mo. banc. 2001); *Jackson County v. Pub. Serv. Comm'n* 532 S.W.2d 20 (Mo. banc. 1975); *State ex rel. City of St. Louis v. Pub. Serv. Comm'n*, 73 S.W.2d 393 (Mo. banc. 1934); *State ex rel. County of Jackson v. Pub. Serv. Comm'n*, 14 S.W.3d 99 (Mo. App. W.D. 2000); *State ex rel. Midwest Gas User's Ass'n v. Pub. Serv. Comm'n*, 996 S.W.2d 608 (Mo. App. W.D. 1999); *State ex rel. Office of the Public Counsel v. Pub. Serv. Comm'n*, 884 S.W.2d 311 (Mo. App. W.D. 1994); *State ex rel. Office of the Public Counsel v. Pub. Serv. Comm'n*, 858 S.W.2d 806 (Mo. App. W.D. 1993); and *State ex rel. Rex Deffenderfer Enterprises, Inc. v. Pub. Serv. Comm'n*, 776 S.W.2d 494 (Mo. App. W.D. 1989). All of the foregoing cases involve various types of PSC proceedings and orders issued therein which have universally been reviewed under Sections 386.500 and 386.510. They are discussed in greater detail in Appellants' Suggestions in Support of Motion for Rehearing or, in the Alternative, for Transfer, App. A hereto, at A5-A7.

subject to rehearing by the PSC, under **386.500**, and thus, reviewable by the circuit court, under **§ 386.510**"). Given that there is simply no ambiguity in the statutory language at issue, this Court should not employ any other rule of construction and attempt to find a meaning contrary to that plain language. *Bosworth v. Sewell,* 918 S.W.2d 773, 777 (Mo. banc. 1996) (A court may not look to other rules of construction when there is no ambiguity). The Western District's recent decision in *City of Park Hills v. Pub. Serv. Comm'n,* 26 S.W.3d 401, 405-06 (Mo. App. W.D. 2000), does not provide any support for that court's "interpretation" of the law. The *Park Hills* court found that an *interlocutory* order denying a motion to dismiss in a PSC proceeding was not, *at that time – when the PSC proceeding was not yet concluded* – ripe for review under Sections 386.500 and 385.510. *Id.* This holding is completely unrelated to the issue here – whether the ultimate order in the case before the court upon completion of the PSC case was (or was not) an "order" within the meaning of Sections 386.500 and 386.510.

3. The PSC Law requires that the Orders be reviewed solely under the PSC Law.

MO. REV. STAT. § 386.270 provides that "all regulations, practices and services prescribed by the commission shall be in force and shall be prima facie lawful and reasonable until found otherwise in a suit brought for that purpose *pursuant to the provisions of this chapter*" (emphasis added). A "suit" is a general term used to refer to proceedings "in a court of law." *Black's Law Dictionary* (6th ed. 1990). "This chapter," as used in Section 386.270, plainly refers only to the PSC Law. Section 386.010; L.

1913, p. 557. The only court proceedings provided for in "this chapter" (the PSC Law) are those prescribed by Sections 386.510 *et seq*. Therefore, it is clear that those matters covered by Section 386.270 must only be attacked in court under Sections 386.510 *et seq*. Clearly then, a "regulation" established by the PSC must be reviewed under the PSC Law.

The Western District, apparently agreeing that a PSC regulation must only be reviewed under the PSC Law, nevertheless attempts to draw a distinction between a regulation and a rule by implying that a "rule" is not a regulation thereby allowing judicial review of rules under another law.

a. A regulation is a rule under the PSC Law.

A "rule" has been defined as an "established standard, guide or *regulation*." *Black's Law Dictionary* (6th ed. 1990) (emphasis added). This Court, in another context, recognized that to "regulate" (which one would do via a "regulation"), means to "adjust, order, or *govern by rule* or established mode; [to] direct or manage according to certain standards or *rules*" (emphasis added). *Marsh v. Bartlett*, 121 S.W.2d 737, 744 (Mo. 1938). Thus, to regulate - via a regulation - is to govern - via a rule. A regulation and a rule are clearly the same thing.

To accept the Western District's apparent attempt to argue that a rule is not a regulation and a regulation is not a rule will lead to illogical and absurd results that will defeat the intent of the legislature. *See, e.g., State ex rel. Mo. State Bd. of Registration for the Healing Arts v. Southworth*, 704 S.W.2d 219, 224 (Mo. banc. 1986) (Courts

should give effect to the intent of the legislature). The narrow reading adopted by the Western District, for example, deprives a *rule* of the Commission of the presumption of validity provided by Section 386.270 while a "regulation" *of* a utility contained in a tariff filed by that utility would be entitled to the presumption. *See State ex rel. Utility Consumers Council of Missouri v. Pub. Serv. Comm'n*, 585 S.W.2d 41, 48 (Mo. 1979) (This Court recognized that rules contained in a utility's tariff, even when such tariff took effect under the "file and suspend" method, are presumed lawful and reasonable under Section 386.270).

The Western District's attempt to split hairs by differentiating between rules and regulations is unnecessary. The language means what it says, and says what it means. If a PSC order is involved (whether it results in a "rule," a "regulation," or an adjudicated decision), it is reviewable under the PSC Law. That interpretation gives effect to the comprehensive and detailed provisions of the PSC Law -- including the presumption afforded by Section 386.270, avoids illogical and absurd results, and does no violence to the overall purposes of the Missouri Administrative Procedure Act (MO. REV. STAT. Ch. 536) ("MAPA") as discussed below.

b. Review under Sections 386.500 and 386.510 is not limited to complaint cases.

The Western District also attempts to narrow the scope of Sections 386.500 and 386.510 by arguing that historically only a limited class of PSC orders or decisions have been reviewable under Sections 386.500 and 386.510. In the First Opinion, the Western

District was quite explicit, stating as follows: "It would seem clear to us that when the PSC Act was first enacted, the legislature, in referencing order or decisions in what are now §§ 386.500 and 386.510, was referring solely to orders or decisions entered by the PSC with respect to complaints filed under § 386.390." First Opinion at 14; App. A at A-14. Appellants, the Atmos Appellants, and the PSC all universally criticized that conclusion. See App. B at B-5-B-8; App. C at C-10-C-13; App. D at D-11-D-13. In the Second Opinion, the Western District was less explicit, but reached essentially the same conclusion, as discussed in detail in this Section I.A.3.b below.

To this end, the Western District states that in the original PSC Law, only Sections 10469, 10487, and 10511 (now codified at Sections 387.300, 393.230, and 392.270, respectively) provided for rehearing before the PSC (under Section 386.500) and review before the circuit court (under Section 386.510). Second Opinion at 13; App. E at E-13. The Western District's reasons that it is "apparent" that the legislature intended for only a very limited class of PSC orders or decisions to ever be subject to review under Sections 386.500 and 386.510, and orders issuing PSC rules were not among them. That limited class, in the Western District's view, is summarized as follows:

> It is clear from the original version of the Act that the legislature intended: (1) for the PSC to hear those *complaints* authorized by the Act; (2) for the PSC to rehear or reconsider its orders or decisions entered with respect to those *complaints*, pursuant to § **10521** [now 386.500]; and (3) for the circuit court to review *those* orders and decisions [arising from the above-

described *complaints* only], after the PSC had ruled with respect to rehearing, as provided in **§ 10522**, now **§ 386.510**.

Second Opinion at 14; App. E at E-14 (emphasis added).

Having reached this conclusion (that if the proceeding does not fit within categories (1) - (3) above, Sections 386.500 and 386.510 do not apply), the Western District had little trouble concluding that an order issuing a rule in a non-complaint proceeding was not subject to review under those Sections.[7]

[7] Despite both Appellants' and the Atmos Appellants specifically raising the issue in their motions for rehearing, the Western District failed to explain, given its limitation of PSC orders subject to review under Sections 386.500 and 386.510 to certain categories, how numerous other PSC orders would now be reviewed. According to the Western District's logic, for example, the vast majority of all rate cases would now apparently be reviewed as non-contested cases under MO. REV. STAT. § 536.150. The PSC is, therefore, given no chance, via a motion for rehearing under Section 386.500, to correct its own errors. In addition, under this interpretation, there are potentially at least four different "tracks" for judicial review of various actions of the PSC, as follows: review under Sections 386.500 and 386.510 for the narrow class of cases – apparently limited to complaint cases -- described at page 14 of the Second Opinion (App. E at E-14); review under MO. REV. STAT. §§ 536.100 *et seq.* for other "contested cases;" review under Section 536.050 for orders issuing rules; and review under Section 536.150 for all other orders, including most rate proceedings. It is difficult to comprehend why the legislature would create a

The statutory history provided by the Western District at pages 13-14 of the Second Opinion, and the conclusions drawn therefrom, is simply incorrect.[8] Nothing in either Sections 387.300, 393.230, or 392.270 (or their predecessors in the original PSC Law) refers to Sections 386.500 or 386.510, or "provides" for review under Sections 386.500 and 386.510.[9] Then again, the statutes referring to the proceedings to which the

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disparate, multi-track scheme for review of what in many instances are essentially the same case, all calling for the unique expertise and experience of the PSC and the courts who regularly deal with PSC matters.

[8] The Western District seems to recognize this possibility when it comments at page 14 (App. E at E-14) of the Second Opinion that much of the Court's analysis is unnecessary given the Western District's interpretation of the effect of enactment of the MAPA in 1945, although the Western District's interpretation there is also flawed.

[9] Those statutes, originally and today, simply provide in a conclusory and generic fashion that "findings [under the statute at issue] shall be subject to review in any circuit court in this state in the same manner and within the same time as other orders or decisions of the commission." Reliance on that language begs the question: are other orders reviewable under Sections 386.500 and 386.510? If not there, then where? In sum, the statutes relied upon by the Western District do not suggest in any way that orders issuing rules, versus orders arising from a complaint versus an accounting authority order, versus an order in a non-complaint rate case, versus numerous other PSC orders, are to be treated

Western District held Sections 386.500 and 386.510 would apply also do not refer to Sections 386.500 and 386.510. The Western District's conclusion, therefore, that a lack of a reference to Sections 386.500 and 386.510 in any of the numerous statutes comprising the PSC Law that provide for the issuance of rules by the PSC is a conclusion with no logical foundation. The PSC Law, as originally enacted and as it stands today, never cross-references Sections 386.500 and 386.510, and never "provides for" review thereunder for one simple reason: There is no need. There was not, and is not, any need for the legislature to go so far as to provide, in every single statute that comprises a part of the PSC law, that "orders or decisions arising under this section shall be reviewed under Section 386.500 *et seq*." because "any" order or decision means what it says – "any order or decision" is reviewable.

B. The Western District's conclusion undermines the nature and purpose of the PSC Law itself.

1. The PSC Law is a total system of public utility regulation.

This Court has long recognized that the PSC Law was enacted in 1913 as a total system of state regulation over public utilities in Missouri. *State ex rel. Cirese v. Ridge*, 138 S.W.2d 1012, 1014 (Mo. banc. 1940). In construing a statute, it is appropriate to consider its history, the presumption of legislative knowledge of the law, and the

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any differently than other PSC orders for purposes of applying the statutes under which judicial review thereof occurs.

purposes sought to be accomplished thereby. *Protection Mutual Ins. Co. v. Kansas City*, 504 S.W.2d 127, 130 (Mo. 1974). Unlike most agency enabling statutes, Section 386.500 of the PSC Law contains detailed provisions requiring rehearing before the agency. From its inception, the PSC Law contained provisions for direct judicial review, including detailed provisions relating to venue, stay of orders, and expediting PSC actions on the court dockets. *See generally* Sections 386.510 - 386.540. It is a complex law that is the means by which the state regulates the few remaining monopolies existing in modern society today. Most PSC orders or decisions are grounded on complex principles of economics, and the legislature saw fit over 89 years ago to vest a specialized body with complete jurisdiction over those complex issues – a basic scheme that remains substantially the same today.

Ironically, the Western District's own opinion in its now-23 year old decision in *SW Bell*, 592 S.W.2d at 187-88, provides a good summary of the rationale for ensuring that review of all PSC orders and decisions remains subject to the PSC Law:

> [I]n connection with the history of judicial review of the Public Service Commission of Missouri, it seems apparent that both on reason and policy the decisions in Clark and Jefferson are correct. Missouri Public Service Commission has been in existence since 1913. Section 386.510, RSMo, providing for review of decisions and orders of the Public Service Commission, has been in place and utilized for the purpose of judicial review throughout the history of the Missouri Public Service Commission.

> When the people of Missouri adopted Article V, s. 22 of the Missouri Constitution, the method of review of Public Service Commission orders was well established and settled in our law. There can be no doubt that the Administrative Procedure Act, enacted shortly following the adoption of the Constitution of 1945, was intended to provide judicial review of administrative agency action in accordance with the 1945 Constitution *for agencies not then subject to a separate plan of review and those which might be later created*. In light of that history, the basic contention of Southwestern Bell, that the legislature intended to engraft upon the review of Public Service Commission proceedings a further proceeding by way of declaratory relief without prior administrative review, does not seem tenable. It is likewise certain that the legislative intent in the enactment of § 386.510, RSMo. providing for judicial review of Public Service Commission proceedings in the Circuit Court of Cole County, evidenced a legislative intent to require venue in Cole County alone and to deny venue for such review in any other counties of the state . . .. The apparent advantages of ease of litigation on the part of the Commission and *uniformity of application of the complex law of the regulation of utilities* apparently underlie this legislative intention * * * (emphasis added).

The Western District's approach in the present case, if adopted by this Court, will mean that cases such as this will likely spawn numerous separate declaratory judgment

actions, all dealing with the same set of PSC rules and the same issues, filed in numerous venues that have likely never, or only very seldom, dealt with a case arising under the PSC Law.[10] *See* Section 536.050.1. The PSC will be required to defend all such actions (and the Public Counsel will presumably be required to appear in each of them), all at taxpayer expense, and all at the risk of the award of attorneys' fees against the state in each and every such separate action. *See* Section 536.050.4. Furthermore, each circuit court could reach a different result, giving rise to policy concerns regarding inconsistent results, and cases could then arise in all three Districts of the Court of Appeals, which could then create conflicts in the interpretation and application of such rules.

Ensuring that the PSC Law provides an integrated and comprehensive scheme for regulating public utilities was obviously important to the legislature in 1913. As repeatedly recognized by the courts of this state, the comprehensive scheme for utility regulation was clearly based on numerous policy considerations that remain important today. In fact, recent court decisions and legislative enactments have reinforced the importance of procedures of the PSC Law, and have broadened the scope of the PSC Law

[10] Taken together, Appellants and the Atmos Appellants have business offices all over the state, from St. Louis City to Jackson County, and most counties in between. Under the review procedures in Section 536.050 that the Western District suggests should apply, public utility regulation could take place in any such county as to a large number of PSC orders.

generally, and review under Sections 386.500 and 386.510 in particular. *See, e.g., State ex rel. County of Jackson v. Pub. Serv. Comm'n*, 14 S.W.3d 99, 101 (Mo. App. W.D. 2000). ("Yet, respondents urge us to construe § 386.510 in a way that would permit the circuit court to take a matter away from the PSC before the PSC could take any steps to correct its earlier action. * * * To construe § 386.510 in the way urged by respondents would [lead to] . . . an unreasonable, if not absurd, process of judicial review."). *Id.* Admittedly, the issues in *County of Jackson* and in this case are different, but the policy considerations are the same: it is good policy to allow the PSC a chance to correct its own errors, and "absurd" not to allow it.[11] *See also State ex rel. Riverside Pipeline v. Pub. Serv. Comm'n*, 26 S.W.3d 396, 399 (Mo. App. W.D. 2000.) (Citing to several cases, the Western District recognizes that the courts have long recognized that *any* PSC order or decision is reviewable exclusively under the PSC Law.).

2. The Legislature continues to reinforce its intent that all orders or decisions of the PSC be reviewed under the PSC Law.

a. Section 386.515 requires exclusive review under the PSC Law.

The legislature's recent enactment of Section 386.515 further emphasizes the legislature's intent that the PSC Law takes precedence over other procedures. While not directed specifically to any particular type of order or decision of the Commission,

[11] If Sections 386.500 and 386.510 (as claimed by the Western District) do not apply to PSC orders promulgating rules, then the PSC will not have that opportunity.

Section 386.515 provides that: "[t]he review procedure provided for in Section 386.510 is exclusive to any other procedure."

Appellants agree that Section 386.515 is primarily directed at the notice required to be given with regard to writ of review proceedings under Section 386.510 as stated by the Western District in a footnote. Second Opinion at 23, n.16; App. E at E-23, n.16. When Section 386.515 was enacted, the legislature was deemed to know this Court's holding in *Clark* and the holdings of the numerous Western District cases such as *SW Bell* that are in accord with *Clark*. *State ex rel. Danforth v. Milan C-II School Dist.*, 446 S.W.2d 768, 771 (Mo. 1969) (Where, in interpreting changes to another well-settled and comprehensive law, this Court stated that the "legislature is presumed to have been familiar with the settled judicial construction of the old law."). The legislature, however, still chose to flatly state, without qualification, that the review procedure provided for in Section 386.510 is "exclusive." *See also* MO. REV. STAT. § 394.312, another instance where the legislature expanded the scope of judicial review under Sections 386.500 and 386.510 rather than narrowing such review by relying upon the MAPA.

b. The legislature did not intend that MO. CONST. ART. V, § 22 negate the provisions for direct judicial review provided in the PSC Law.

Art. V, § 22 provided in pertinent part as follows: "All final decisions, findings, rules and orders of any administrative officer or body . . . shall be subject to direct review by the courts as provided by law."

Appellants agree with the Western District's contention that Art. V, § 22 required that the actions of administrative agencies be subject to some form of direct judicial review, and that starting with its enactment in 1945, the legislature (if it had not previously done so) was required to provide a procedure for such direct judicial review. Appellants also agree that this Court recognized in *State ex rel. State Highway Comm'n v. Weinstein*, 322 S.W.2d 778, 784 (Mo. banc. 1959), that the now-constitutional requirement that direct judicial review be provided applies to all administrative agencies, including the PSC. The MAPA, however, is not the only mechanism provided under Missouri's statutes for direct review. Sections 386.500 and 386.510 contain the procedure established by the legislature for direct judicial review of PSC decisions, and comply with the requirement of Art. V, § 22.

In arguing that Art. V, § 22 requires review under MAPA rather than the PSC Law, the Western District relies on *Weinstein*, 322 S.W.2d 778. A careful reading of this Court's entire discussion of that issue in *Weinstein*, however, demonstrates that this Court never said or implied that the MAPA takes precedence over the then-applicable provisions of the PSC Law. 322 S.W.2d 778. In *Weinstein*, this Court recognized that the PSC Law is our "oldest and best example" that quasi-legislative functions of an administrative agency could be subjected to judicial review, as had been the case with respect to the PSC *since the inception of the PSC Law in 1913. Id.* At 784. All Art. V, § 22 did, with respect to the review required under the PSC Law, was to impose a constitutional requirement that such review exist – in other words, after the adoption of

Art. V, § 22, the legislature could not, had it been inclined to do so, remove direct judicial review of PSC actions. That does not suggest, however, that adoption of Art V, § 22 changed the "method of review" of a PSC order issuing a rule. *Weinstein*, 332 S.W.2d at 784 ("Providing review and the *method of review* are matters left for the *legislature* . . ." (emphasis added)). The language of Art. V, § 22 simply provides that the required judicial review is to occur "as provided by law." The method provided by the legislature for review of PSC actions was, and still is, found in Sections 386.500 and 386.510.

The mistaken analysis of the effect of Art. V, § 22 proposed by the Western District, coupled with their narrow characterization of the categories of PSC orders or decisions that remain subject to Sections 386.500 and 386.510 (*See* Section I.A.3.b. of this Brief, *supra*) makes even more clear the flaw in the Western District's logic. If it "is clear" that the original intent of the legislature in using the phrase "any order or decision" was to limit the meaning of that language to a narrow class of orders, since the MAPA was not enacted until 1945, there apparently would have had to have been a huge gap in judicial review of many PSC orders from 1913 to 1945. This gap would have existed despite the fact, as the Western District concedes, that the Commission has had the power to issue orders promulgating rules since the inception of the PSC Law. Second Opinion at 8-9, App. E at E-8-E-9; *See also* App. B at B-3-B-4.

It is unreasonable to conclude that a couple of statutory amendments (*See* Section Section I.B.3 of this Brief, *infra*) are sufficient to overrule controlling precedent of this Court, to reverse numerous appellate decisions in this state, and to reverse 89 years of

practice involving the PSC. This is particularly true since doing so leads to the illogical conclusion that when the legislature implemented the PSC Law, it chose to leave a gaping hole in judicial review of most PSC orders, especially given the legislature's obvious intent to enact a detailed and comprehensive regulatory scheme of utility regulation that provides a special, expedited judicial review process. That result, as proposed by the Western District, is illogical and should be ignored.

3. Enactment of MO. REV. STAT. § 386.250(11) (now Section 386.250(6)), and more recently MO. REV. STAT. § 394.312, does not suggest an intent to remove the majority of PSC proceedings from judicial review under the PSC Law. Neither does the amendment to MO. REV. STAT. § 536.010(4) .

a. Section 386.250(6) does not suggest that the MAPA applies in lieu of the PSC Law.

The Western District first relies upon what is now Section 386.250(6), which was originally enacted in 1977 as Section 386.250(11), contending that Section 386.250(6) did not *expressly* provide for judicial review of PSC orders issuing rules under Sections 386.500 and 386.510. The Western District concludes that, as a result, judicial review must be under the MAPA and not the PSC Law. With the limited exceptions discussed below, the legislature never expressly provides in any statutes, whether a part of the PSC Law or outside of it, that review of any particular PSC order was to occur under Sections 386.500 and 386.510. The legislature's failure in Section 386.250(6) to specifically refer

to Sections 386.500 and 386.510 is no different than its failure to refer to those Sections in other statutory provisions of the PSC Law, including those provisions that even the Western District agrees are subject to review under Sections 386.500 and 386.510.

Section 386.250(6) provides in pertinent part as follows:

> All such proposed rules shall be *filed* with the secretary of state and *published* in the Missouri register as provided in chapter 536, and a hearing shall be held at which affected parties may present evidence as to the reasonableness of any proposed rule (emphasis added).

The Western District takes that language and, as evidenced by the italicized language set forth below, effectively changes its meaning:

> Within three years after *Clark* was decided . . . the legislature . . . enacted what is now Section 386.250(6), authorizing the PSC to promulgate rules *in accordance with the procedures set forth in Chapter 536*, without referencing the review procedures in §§386.500 and 386.510, *as it had done on other occasions.*

Second Opinion at 22-23; App. E at E-22-E-23 (emphasis added).

The Western District's analysis is simply incorrect. Requiring that the proposed rules be *filed* and *published* under the MAPA is a far cry from requiring that such rules be "adopted and reviewed in accordance with the procedures set forth in Chapter 536." If the statute had provided that the rules are to be "adopted and reviewed" under the MAPA, then as to rules arising solely under Section 386.250(6), it might be reasonable to

conclude (if the statute were viewed in a vacuum apart from the rest of the PSC Law and its purposes) that the legislature intended the judicial review provisions of the MAPA to apply to rules issued under Section 386.250(6) in lieu of Sections 386.500 and 386.510. That is not the case, however.[12]

Further evidence that the legislature did not intend for the MAPA to entirely supercede the PSC Law with respect to proceedings under Section 386.250(6) is found in the language requiring, with respect to rules implemented under this Section, that "a hearing shall be held at which affected parties may present evidence as to the reasonableness of any proposed rule . . .." Section 386.250(6). There is nothing in the MAPA requiring that in proceedings involving rules, "affected parties" be entitled to "present evidence." Quite clearly, the legislature treats proceedings involving the PSC differently than proceedings involving most other agencies, and PSC Orders issuing rules should be reviewed solely under Sections 386.500 and 386.510.

Finally, if the Western District's rationale is correct, it was completely illogical for the legislature to have referenced the filing and publication provisions of the MAPA in Section 386.250(6) because the MAPA (i.e., all of Chapter 536) would have applied to

[12] As Appellants pointed out above, the legislature has also not so provided on other occasions, save the one reference in the Rural Electric Cooperative case, discussed *infra*.

the adoption of PSC rules *without the need for such a reference.*[13] By explicitly referencing *only* the filing and publication provisions of the MAPA, and by *not* referencing the judicial review provisions of the MAPA, the legislature in fact evidenced its intent *not* to change existing law and not to remove review of orders issued under Section 386.250(6) from the purview of Sections 386.500 and 386.510.

b. A provision of the Rural Electric Cooperative Law does not suggest that the MAPA applies in lieu of the PSC Law.

There are five references to review under Sections 386.500 and 386.510 in the entirety of the Missouri Revised Statutes, one of which is in the Rural Electric Cooperative Law, MO. REV. STAT. Ch. 394[14]. The lack of such references, however, is

[13] It is not surprising that the legislature continues to treat orders regarding rules of the PSC different from rules issued by most other agencies. *See* MO. REV. STAT. §§ 536.024 and 536.037, which both exempt PSC rules (other than an emergency rule) from submission to the joint committee on administrative rules.

[14] There are references to Sections 386.500 and 386.510 in two similar statutes dealing with territorial agreements with water districts and municipalities. *See* Section 386.710, dealing with Public Counsel's powers also makes clear the Public Counsel's right to participate in such proceedings, and, as noted above, Section 386.515 which makes clear the exclusivity of Section 386.510.

completely reasonable given the complete clarity of the language "any order or decision" included in these sections, and the comprehensive nature of the PSC Law itself.

The Rural Electric Cooperative Law is not a part of the PSC Law, and certainly was not a part of the original PSC Law, and therefore should not be read *in pari materia* with the PSC Law. As a result, when the legislature determined that territorial agreements should be reviewed by the PSC, a specific reference to Section 386.500 and 386.510 was included to ensure judicial review would occur under these sections.[15] The legislature recognized a need to specify that territorial agreements should be reviewed under Sections 386.500 and 386.510 since ordinarily judicial review procedures within the PSC Law would not apply to non-PSC Law proceedings. The legislature's inclusion of a reference to Sections 386.500 and 386.510 in Section 394.312 is an expansion of the coverage of the judicial review provisions of the PSC Law, rather than a narrowing of the coverage of these sections, as the Western District contended. This expansion appears consistent with the legislature's purpose for the PSC Law – if a matter is within the PSC's jurisdiction, review of the orders or for decisions should be according to the procedures set out in the PSC Law.

c. The MAPA has not superceded the PSC Law, nor has it legislatively overruled *Clark* or its progeny.

[15] The exact same logic applies to the statutes dealing with territorial agreements involving water districts and municipalities.

As noted above, the MAPA fills gaps in procedure. *State ex rel. Noranda Aluminum, Inc. v. Pub. Serv. Comm'n*, 24 S.W.3d 243, 245 (Mo. App. W.D. 2000). The MAPA does not supplant agency statutes. *Hundley v. Wenzel*, 59 S.W.3d 1, 4-5 (Mo. App. W.D. 2001). Rather, where a specific statute exists concerning judicial review of an agency's administrative process, the specific judicial review statute governs and the "general provisions for judicial review of administrative decisions found in Chapter 536 . . ." do not apply. *Id.*

In addition to the other statutes cited by the Western District as authority for disregarding the application of Sections 386.500 and 386.510 to the Orders in this case, and for disregarding *Clark*, the Western District also suggests that the legislature's amendment of Section 536.010(4) somehow indicates an intent to entirely change the scheme of judicial review of PSC actions over the previous 60 years. Second Opinion at 14-21; App. E at E-14-E-21.

A central problem with this view is that it not only ignores the fact that the MAPA is merely a gap-filler, but it also takes a legislative amendment regarding one subject in one general statute (i.e., clarifying the distinction between a rule and a contested case in the MAPA) and interprets that amendment to supercede other specific statutory provisions that clearly apply to all orders of a particular agency. *Greenbriar Hills Country Club v. Dir. of Revenue*, 935 S.W.2d 36, 38 (Mo. banc. 1983) (When the same subject matter is addressed in general terms in one statute and in specific terms in another statute, the specific statute controls over the general). Nor do general provisions of the

MAPA provide any credible support for overruling a controlling decision of this Court that deals with the PSC Law, a subject matter entirely different than the MAPA. "[C]ase law is not overruled by subsequent statutory changes unless the changes are directed *specifically* to the subject matter of the judicial interpretation." *Bierman v. Bierman*, 657 S.W.2d 65, 67 (Mo. App. E.D. 1983) (emphasis added). *See also State v. Bailey* 760 S.W.2d 122, 126 (Mo. 1988) (*citing Bierman).*

When this Court decided *Clark* in 1974, it became a "part of that statute [Sections 386.500 and 386.510] as if it had been so amended by the Legislature." *Dow Chem. v. Dir. of Revenue*, 834 S.W.2d 742, 745 (Mo. banc. 1992). Furthermore, the legislature is presumed to have known, when it enacted/amended Sections 386.250(6), 536.010(4), and 394.312, that PSC orders adopting rules have been reviewed under Sections 386.500 and 386.510 like every other PSC order and decision. *Milan C-II School Dist.*, 446 S.W.2d at 771.

Knowing that *Clark* involved an order promulgating a rule, an order that did *not* result from any of the types of proceedings that the Western District contends are the only proceedings reviewable under Sections 386.500 and 386.510, and knowing that this Court determined the order in *Clark* could only be reviewed under Sections 386.500 and 386.510, the legislature nevertheless has never acted to amend the PSC Law in a way that can fairly be said to have been intended to override the plain meaning of Sections 386.500 and 386.510 or to overrule *Clark*. The legislature is perfectly capable of doing so, when it so chooses. *See e.g.*, Section 386.515, discussed above.

The legislature is deemed to know not only the holding in *Clark*, but also the existence of more than 60 years of jurisprudence preceding *Clark*, in which Missouri courts consistently applied the special statutory review process of Sections 386.500 and 386.510 to all orders or decisions of the PSC. *Milan C-II School Dist.*, 446 S.W.2d at 771. This Court states in *Clark* that an order promulgating a PSC rule of general applicability is reviewable solely under the "special separate statutory procedure for review of an 'original order or decision' of the Commission . . . and that the procedure provided for in § 386.510 is exclusive and jurisdictional." *Clark*, 511 S.W.2d at 825. More specifically, *Clark* holds that an administrative rule of the PSC cannot be challenged by a declaratory judgment, but *must* be challenged under Section 386.510. *Id.* at 824-25.

The Western District criticizes *Clark* for, among other reasons, relying on "dicta" from *State ex rel. State Tax Commission v. Luten*, 459 S.W.2d 375 (Mo. banc. 1970) (Second Opinion at 21-22; App. E at E-21-E-22). Notably absent from the Court's discussion of *Clark* and *Luten*, however, is the fact that this Court in *Clark*, while itself recognizing that the statements in *Luten* were dicta, specifically stated that "[t]his may have been dicta in the Luten case, but it is dicta with *which we agree*, and we also agree with the subsequent statement [in Luten] that '[s]uch provision (for review) may be all inclusive, as per example Section 386.510 in connection with the Public Service Commission, and the procedure therein should be followed.'" *Clark*, 511 S.W.2d at 825 (emphasis added). Furthermore, as the Western District has acknowledged before, it is

not the province of the Court of Appeals to overrule cases from the Missouri Supreme Court. *Merriweather v. State*, 884 S.W.2d 359, 361 (Mo. App. W.D. 1994).

The Western District criticizes *Clark* on two other primary grounds: that it was authored by a Commissioner of this Court, implying that it is somehow less "legitimate;"[16] and that it discussed then-Rule 100 versus Rule 87.[17]

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[16] It was also adopted by this Court, an adoption in which all of the Judges concurred. It suffices to say that *Clark* is no less good law, regardless of who the author was.

[17] The Western District also relies upon A. Neely, 20 *Mo. Pract., Admin. Practice and Proc.* § 7.22 (3d ed. 2002), asserting that it too supports its conclusion. Second Opinion at 22, n.15; App. E at E-22, n.15. It is true that Professor Neely has questioned whether a better legislative policy might be, under certain circumstances, to widen the availability of seeking declaratory relief under Section 536.050 to all decisions of all agencies.

The problem with the Western District's apparent reliance on Professor Neely's treatise, however, is that the Western District took one, isolated quote from the treatise while ignoring an important basis for Professor Neely's concerns, not to mention the plain meaning of, and the unique purpose of, the PSC Law. Professor Neely's treatise discusses cases in which the agency rule has become final and all ongoing judicial review related to its initial adoption is over. Those are not the facts at issue in the present case. The orders of the PSC issuing the subject rules are under review as part of an ongoing, continuing review proceeding as contemplated by the PSC Law. As Professor Neely notes, "If the agency action at issue is in fact a rule, declaratory judgment is intended to

Had this Court, as the Western District suggests it should have done, looked to Rule 87 instead of Rule 100, the result reached would not have been different. The Western District's argument regarding Rule 87 versus Rule 100 is precisely the argument it makes in suggesting that the MAPA trumps and supercedes the specific statutory review mechanism provided by the PSC Law in Sections 386.500 and 386.510. It is an attempt to take a statute of *general applicability*, and to interpret it such that it controls over a *specific* statutory provision that prescribes the exclusive method of judicial review with respect to PSC actions. That interpretation, as discussed above, renders meaningless the following language of Section 386.510: "No court in this state, except the circuit courts *to the extent herein specified* and the supreme court or the court of appeals on appeal, shall have jurisdiction to review, reverse, correct, or annul any order or decision

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be available without exhausting other remedies that might later become available to challenge the rule. *The important exception to this general principle is that if the legitimacy of a rule is already the object of some ongoing administrative proceeding, one will not be allowed to abandon the ongoing proceeding to seek declaratory judgment." Id* (emphasis added). This Court has specifically found that judicial review of a PSC order or decision under Section 386.510 is in the nature of a continuing and ongoing administrative proceeding. *Anderson Motor Svc. Co., Inc. v. Pub. Serv. Comm'n*, 97 S.W.2d 116, 119 (Mo. 1936). Thus, review of all PSC orders under Section 386.510 fits the "important exception" discussed by Professor Neely, again demonstrating that the Western District is incorrect in so narrowly applying the PSC Law.

of the commission or to suspend or delay the executing or operation thereof, or to enjoin, retrain or interfere with the Commission in the performance of its official duties" (emphasis added). It also renders meaningless Section 386.270, also discussed above, which provides that any such suit must be brought "pursuant to the provisions of this chapter." Finally, it is contrary to this Court's decision in *State ex rel. Pub. Serv. Comm'n v. Blair*, 146 S.W.2d 865, 868-70 (Mo. banc. 1941), which reaffirmed that declaratory judgments are not available for review of PSC orders.

For the foregoing reasons, Appellants properly sought review of the Orders under Section 386.510, and the present appeal is properly before this Court. Section 386.540.

II. THE PSC ERRED IN ISSUING THE ORDERS THAT CREATED THE RULES BECAUSE THE RULES EXCEED THE PSC'S LEGISLATIVE AUTHORITY IN THAT THE "ASYMMETRICAL PRICING" STANDARDS IN THE RULES ADJUDGE ACTS OF A PUBLIC UTILITY TO BE UNREASONABLE, UNJUST, UNJUSTLY DISCRIMINATORY OR UNDULY PREFERENTIAL WITHOUT ADJUDICATION AS REQUIRED BY MO. REV. STAT. § 393.140(5).

STANDARD OF REVIEW

With regard to the standard for review on appeal from the Circuit Court's decision affirming or denying an order of the PSC, the standard for review is two-pronged: first, this Court must determine whether the PSC's order is lawful; and second, if the order is lawful, this Court must determine whether the PSC's order is reasonable and based upon

competent and substantial evidence upon the whole record. *Friendship Village of South County v. Pub. Serv. Comm'n*, 907 S.W.2d 339, 344 (Mo. App. W.D. 1995). Whether the PSC's orders are lawful depends upon whether the PSC had statutory authority to act as it did. *Id.* In making that determination, this Court exercises "unrestricted, independent judgment." *Id.* In determining the statutory authority for, or lawfulness of, a PSC order, this Court "need not defer to the commission, which has no authority to declare or enforce principles of law or equity." *State ex rel. Utility Consumers Council of Missouri, Inc. v. Pub. Serv. Comm'n*, 585 S.W.2d 41, 47 (Mo. banc. 1979). On appeal, the appellate court reviews the decision of the PSC, not the judgment of the trial court. *Deaconess Manor Ass'n v. Pub. Serv. Comm'n*, 994 S.W.2d 602, 607 (Mo. App. W.D. 1999). With regard to administrative rules, such rules "must be promulgated within the scope of the legislative authority conferred upon the state agency" or they are void. *Associated Industries of Missouri v. Angoff*, 937 S.W.2d 277, 282 (Mo. App. W.D. 1996). Furthermore, rules are void if they "attempt to modify or extend" the applicable statutes. *Id.*

A. The PSC must act within the confines of its jurisdiction and authority as set by the Legislature.

The PSC is "purely a creature of statute" and its "powers are limited to those conferred by the statutes, either expressly or by clear implication as necessary to carry out the powers specifically granted." *Utility Consumers Council, 585 S.W.2d at 49; City of West Plains v. Pub. Serv. Comm'n*, 310 S.W.2d 925, 928 (Mo. banc. 1958). "It is for

the legislature, not the P.S.C., to set the extent of the latter's jurisdiction." *Utility Consumers Council*, 585 S.W.2d at 54. The mere fact that other decisions of the PSC, or decisions in other states, permit a particular order of the PSC "is irrelevant if . . . [the order is] not permitted under our [Missouri's] statute." *Id.* Also, the mere fact that the PSC argues that a particular order or rule is a simpler or more efficient method of regulation does not allow the PSC to modify the Legislature's grant of authority to the PSC. "[N]either convenience, expediency, or necessity are proper matters for consideration in the determination of whether or not an act of the commission is authorized by the statute." *Utility Consumers Council*, 585 S.W.2d at 49 (*citing State ex rel. Kansas City v. Public Service Commission*, 257 S.W.2d 462 (Mo. banc. 1923)). Furthermore, the Legislature, not the PSC and not the courts, must determine if a different manner of regulation is warranted: "'[i]t is not up to this court to strike the appropriate balance between public participation and simplicity in rate proceedings. That determination is for the legislature.'" *Id.* at 50 (*quoting with approval Wisconsin's Environmental Decade, Inc. v. Public Service Commission*, 81 Wis.2d 344, 260 N.W.2d 712, 715 (1978)).

B. <u>The asymmetrical pricing standards cannot lawfully be adopted via rulemaking. Rather, the PSC must first find, in an adjudicated contested case, that a particular utility's expenditures are unjust, unreasonable, unjustly discriminatory, or unduly preferential.</u>

1. A rulemaking is only appropriate with respect to the recordkeeping provisions of the Rules.

The Rules contain numerous recordkeeping provisions. In fact, the PSC has repeatedly stated that the purpose of the rules is to "enable the [PSC] to have the information and data necessary to determine if the utility ratepayers are subsidizing non-regulated affiliate operations." Circuit Court Brief of Respondent, App. F hereto, at F-1. To the extent that the Rules require such information and data to be kept by the regulated utility, Appellants do not contend that the PSC lacks jurisdiction to impose reasonable information and recordkeeping requirements via rulemaking.

There are different limits, however, on the extent of the PSC's jurisdiction to act via rulemaking as compared to the extent of that jurisdiction to act in an adjudicatory proceeding (i.e. in a "contested case"). Appellants agree that the PSC has authority over the items, and the amounts expended for those items, that can be properly included in a utility's operating expenses for the purpose of setting the utility's rates. *See, e.g.*, *State ex rel. Gen. Tel. Co. v. Pub. Serv. Comm'n*, 537 S.W.2d 655, 659 (Mo. App. W.D. 1976). The PSC cannot, however, disallow those expenditures by generally declaring them to be unlawful except in an adjudicated, contested case under MO. REV. STAT. § 393.140(5).

2. Utility expenditures can only be declared unlawful in a contested case.

The Rules provide that a regulated utility "shall not provide a financial advantage to an affiliated entity." *See, e.g.*, 4 C.S.R. 240-20.015(2)(A). The Rules also provide that a regulated utility "shall be *deemed* to provide a financial advantage to an affiliated

entity" if the regulated utility pays the affiliate more than the lesser of fair market price or fully distributed cost to the regulated utility (if the regulated utility had provided the goods or services itself) (emphasis added). *Id.* Further, the regulated utility will be *deemed* to provide a financial advantage if the affiliate, in obtaining goods or services from the regulated utility, pays less than the greater of fair market price or the fully distributed cost to the regulated utility of providing the goods or services. The foregoing "asymmetrical pricing standards" amount to a declaration in advance that expenditures and acts of a public utility not in compliance with the Rules are unlawful. If the utility fails to meet the standards, the transaction is unlawful, without regard to the facts surrounding the transaction and without regard to whether the transaction does or does not affect utility ratepayers.[18]

Section 393.140(5) provides as follows:

> Whenever the commission shall be of the opinion, *after a hearing had upon its own motion or upon complaint,* that the rates or charges or the acts or

[18] That declaration could have immediate consequences for the utility. For example, the Rules provide that failure to comply with the Rules, including the asymmetrical pricing standards, entitles the PSC to "apply any remedy available to the commission." 4 C.S.R. 240-20.015(8)(A). *See, e.g.*, MO. REV. STAT. §§ 386.570 - 386.600, which make failure to comply with a PSC *rule* an offense, provide for individuals to be charged with misdemeanors under certain circumstances, and impose fines, penalties and possible imprisonment on offenders.

> regulations of any such [regulated utility] are unjust, unreasonable, unjustly discriminatory, or unduly preferential . . . the commission shall determine and prescribe . . . the just and reasonable acts . . . to be done and observed . . . (emphasis added).

The court's decision in *General Telephone*, 537 S.W.2d 655, illustrates the lawful and jurisdictional process the PSC must follow when it seeks to disallow the costs associated with an affiliate transaction. *Id.* at 658. The *General Telephone* case involved a PSC challenge to a regulated telephone company's purchase of telephones and equipment from its unregulated affiliate. The claim was that the regulated company was paying too much for the phones and thus improperly subsidizing the unregulated equipment manufacturing operation to the detriment of ratepayers. The Western District held the PSC had the power to determine the reasonableness of amounts paid by a telephone company to its affiliated supplier of telephone equipment. *Id.* at 659. The power of the PSC to determine the reasonableness of such amounts was found to be derived from the PSC's statutory power to fix rates. *Id.* In other words, it is when the PSC exercises its ratemaking function, under Section 393.140(5), that it can pass on the reasonableness of an expenditure. The PSC's power to pass upon the reasonableness and lawfulness of rates and to determine what rates are necessary to yield a fair return for the utility "necessarily includes the power and authority to determine what items are properly includable in a utility's operating expenses and to determine and decide what treatment should be accorded such expense items." *Id.*

The PSC properly exercised its authority in *General Telephone* over affiliate transactions in the context of an adjudicatory rate determination proceeding under Section 393.140(5). The court was able to review the record and determine that the PSC's rejection of the claimed expenses was supported by "competent and substantial evidence of record" that justified the rate adjustment ordered by the PSC. *Id.* at 664; MO. REV. STAT. § 536.140.2(3); MO. CONST., ART. V, § 18. The court was careful to endorse no greater exercise of PSC authority over affiliate transactions:

> The commission is not the financial manager of the corporation, and it is not empowered to substitute its judgment for that of the directors of the corporation; nor can it ignore items charged by the utility as operating expenses unless there is *an abuse of discretion* in that regard by the corporate officers. *Id.* at 660 (emphasis added) (*citing with approval State Public Utilities Commission ex rel. Springfield v. Springfield Gas & Electric Co.*, 125 NE 891, 901 (Ill. 1919)).

The asymmetrical pricing standards unlawfully attempt an “end-run” around the legislative requirement that the PSC, in disallowing a transaction or expenditure with an affiliate, adjudicate in a contested case whether the utility’s rates should be adjusted. Before such an adjustment can lawfully be made, the PSC must make a finding, based upon substantial and competent evidence of record, that the utility paid an unreasonable amount to the affiliate for goods or services. The PSC has no power, however, to impose a pre-judged, blanket rule that takes into account *no facts*, and is not based on *any*

evidence, and thereby subjects the utility to sanctions and reductions in its rates when no adjudication, with respect to whether the particular transaction is or is not unreasonable or otherwise unlawful, has ever been properly made in a Section 393.140(5) proceeding.

The requirement that the PSC exercise its jurisdiction over utility expenditures in an adjudicatory proceeding based upon facts and evidence of an abuse of discretion is also illustrated by *State of Missouri ex rel. Southwestern Bell Tel. v. Pub. Serv. Comm'n*, 262 U.S. 276, 43 S.Ct. 544 (1923). In the *Southwestern Bell Tel.* case, the United States Supreme Court reversed the PSC's disallowance of rents paid by the telephone company to the parent company (an "affiliated entity" under the Rules). The PSC had adjudicated the reasonableness and lawfulness of the expenditure in a Section 393.140(5) proceeding. However, the United States Supreme Court reversed the PSC's finding of unreasonableness because the PSC had *totally failed to make a finding of an abuse of discretion or the exercise of improper business judgment* by the telephone company's board of directors. That failure prohibited the PSC from lawfully disallowing the expense. *Southwestern Bell Tel. Co.*, 43 S.Ct. at 546-47 (*citing Springfield Gas & Electric*, 125 N.E. at 901).

General Telephone and *Southwestern Bell Tel.* demonstrate the problem with the asymmetrical pricing standards. It is impossible for the PSC to have "made a finding" that any utility has abused its discretion in imposing a particular charge on an affiliate, or paying a particular amount to an affiliate, unless the PSC adjudicates what the charge or payment is, what went into it, what were the circumstances surrounding the transaction at

issue, and generally whether that charge or payment is reasonable and lawful. In effect, the adoption of the asymmetrical pricing standards allows the PSC to take over the management of a utility with respect to transactions between the utility and its affiliate. This the PSC cannot do. *General Telephone*, 537 S.W.2d at 660.

3. The asymmetrical pricing standards unlawfully shift the PSC's burden of going forward to the utility.

The PSC's failure to adjudicate the reasonableness of utility expenditures, whether between the utility and its affiliates or between the utility and others, also flies in the face of established principles governing both the PSC's and the courts' review of the prudence of utility expenditures.

When a utility makes an expenditure that it wishes to include in its rates, that expenditure is "presumed to be prudently incurred." *State ex rel. Associated Natural Gas Co. v. Pub. Serv. Comm'n*, 954 S.W.2d 520, 528 (Mo. App. W.D. 1997) (*quoting In re Union Electric Company*, 27 Mo. P.S.C. (N.S.) 183, 193 (1985)). As the PSC itself recently recognized, whether an expenditure may be included in rates is tested by "a standard of reasonable care requiring due diligence as the standard for evaluating the prudence of a utility's conduct." *In re Missouri-American Water Co.*, Report and Order of Missouri Public Service Commission dated August 31, 2000, Case No. WR-2000-281. Under the reasonable care standard, it is the parties challenging the "conduct, decision, transaction, or expenditures of a utility" that "have the initial burden of showing inefficiency or improvidence, thereby defeating the presumption of prudence accorded

the utility." *Id.* This reasonable care standard has as its roots the fundamental principles cited above that prohibit the PSC from taking over the management of the utility. *Id.* (*citing State ex rel. City of St. Joseph v. Pub. Serv. Comm'n,* 30 S.W.2d 8, 14 (Mo. banc. 1930)).

To meet its initial burden to rebut the presumption of reasonableness afforded a utility's expenditures, the PSC (or complainant, if the challenge is by others) must put on evidence that "creates a serious doubt as to the prudence of an expenditure . . .." *Associated Natural Gas Co*., 954 S.W.2d at 528 (*quoting In re Union Electric*, 27 Mo. P.S.C. at 193). Finally, and of utmost importance, for the PSC to disallow an expenditure "without reference to any detrimental impact" the expenditure has on customers – on ratepayers – is "beyond [the PSC's] statutory authority." *Id.* at 530.

It is axiomatic that the disallowance of an expenditure via a blanket rule such as the asymmetrical pricing standards cannot possibly meet the requirement that those challenging the expenditure establish by evidence "a serious doubt" as to its prudence. It is equally clear that without evidence, and adjudication thereon, it is impossible for the PSC to have referenced and considered, as it must do, whether the expenditure in question has a "detrimental impact" on ratepayers. Absent such consideration, disallowance of the expenditure is beyond the PSC's statutory authority. *Id.*

If, as in the *Associated Natural Gas Co.* case, it is "beyond [the PSC's] statutory authority," in a contested case, to disallow recovery of costs for expenditures absent proof of detriment to ratepayers, it is certainly beyond the PSC's statutory authority to

disallow such expenditures before they ever take place via the Rules where not a single shred of evidence regarding the prudence of those costs was or could have been presented. What the asymmetrical pricing standards do is to unlawfully shift the burden of going forward to the utility. No longer does the complainant or the PSC have to present evidence that, if unrebutted, would establish the unreasonableness or unlawfulness required by Section 393.140(5). Rather, the utility has already been found to have acted unreasonably or unlawfully simply by failing to meet an abstract standard in a rule of general application that does not take into account a single fact surrounding why or what a utility paid for, or charged for, particular goods or services in transactions with its affiliate. Furthermore, no longer does the utility have "the lawful right to manage its own affairs and conduct its business in any way it may choose, provided that in so doing it does not injuriously affect the public." *St. Joseph*, 30 S.W.2d at 14. No longer does the PSC have to "assess management decisions at the time they are made and ask the question, 'Given all the surrounding circumstances existing at the time, did management use due diligence to address all relevant factors and information known or available to it when it assessed the situation?'" *Missouri-American Water (quoting In re Union Electric*, 27 Mo. P.S.C. at 194). Rather, the Rules improperly allow the PSC to adjudge certain expenditures to be unlawful without any consideration of the circumstances and without any consideration of whether the expenditures injure the public in any way. The PSC tells the utility "you shall buy and sell goods and services this way, and this way only – this is how you will conduct your business with affiliates."

The PSC has no such authority. *See State ex rel. Kansas City Transit, Inc. v. Pub. Serv. Comm'n*, 406 S.W.2d 5, 11 (Mo. banc. 1966) ("[T]he commission's authority to regulate does not include the right to dictate the manner in which the company shall conduct its business").

In short, the asymmetrical pricing standards specifically and directly restrict lawful transactions of the utility with its affiliate and *deem* such activities unlawful unless the utility meets the pricing standards. They also determine the rights of specific parties: If the asymmetrical pricing standards apply, UE, Laclede Gas, Associated Natural Gas, and every other utility subject to the Rules no longer have the right to price the goods and services they exchange with affiliates, except as specifically prescribed by the PSC. The "legal rights, duties or privileges of specific parties" have now been determined, and in fact restricted, by PSC action. That cannot be done except via a contested case, per MO. REV. STAT. § 536.010(2), and such a contested case must be conducted under Section 393.140(5). Having failed to conduct such a case, the asymmetrical pricing standards are void.

4. The need for a proper, adjudicated factual determination regarding whether expenditures are in fact reasonable is especially important given Ameren's holding company structure.

As previously noted in the Statement of Facts, Ameren Corporation, UE's parent company, is a registered holding company under PUHCA. As a registered holding company, Ameren Corporation is subject to the "integration standards" of PUHCA

which, among other things, require that Ameren Corporation's electric utility system, which includes its ownership of UE, be operated as a single interconnected system. (L.F. 167-68).

To comply with PUHCA's integration standards, a service company is utilized for the purpose of providing various corporate support services to the companies owned by Ameren Corporation. (L.F. 167-68; 173-78). To that end, Ameren Corporation created Ameren Services Company ("Ameren Services"). *Id.* Ameren Services provides services to UE such as accounting, financial, statistical, legal, engineering, regulatory compliance, tax, information technology, and purchasing. (L.F. 173).

PUHCA requires that Ameren Services charge the companies, including UE, consistent with the "at cost" standard prescribed by the Securities and Exchange Commission. (L.F. 167-68; 175-78). The "at cost" standard means that all consumers of the services, including UE and the non-regulated businesses owned or controlled by Ameren Corporation, pay their fair share of the actual costs incurred by Ameren Services to provide the services. *Id.* This includes direct costs and indirect costs, such as taxes, interest, and overhead, all of which must be "fairly and equitably allocated." 15 U.S.C.S. § 79m(b) (1998); (L.F. 175). UE cannot lawfully be charged more for accounting services, for example, than its fairly allocated share of Ameren Services' costs for the accounting services UE receives. This ensures that UE will not subsidize the cost of accounting services provided to other non-regulated Ameren businesses. Such subsidization is unlawful under PUHCA. (L.F. 167-68; 173-78).

Cost as to particular goods or services may not, however, always be less than fair market price as to a given service at a given time, assuming fair market price can be determined at all. The asymmetrical pricing standards, however, declare unreasonable and therefore could prohibit UE's acquisition of purchasing services from Ameren Services on those facts. As previously discussed, this would be improper because it is done without adjudication as required by Missouri law.

The asymmetrical pricing standards, particularly for Ameren Corporation and UE, effectively and unlawfully take over UE's management. *See, e.g., City of St. Joseph*, 30 S.W.2d at 14. The decision to merge with CIPS and operate as a holding company under PUHCA was the result of a management determination, based upon facts known at the time, that the combined companies could gain massive operational efficiencies forecast at more than $700 million over the first 10-year period following the merger. (L.F. 172). The effect of the asymmetrical pricing standards is to use hindsight to undermine that management determination without any adjudicated proof that ratepayers are harmed or UE's costs are unreasonable or otherwise unlawful.

Missouri law requires that the PSC adjudicate, and that the complainant go forward with evidence, to support a claim that a utility's operating costs are unreasonable and detrimental to ratepayers. *Associated Natural Gas Co.*, 954 S.W.2d at 528 (citing *In re Union Electric*, 27 Mo. P.S.C. at 193). The law requires that management decisions be presumed reasonable and tested by asking "whether the conduct was reasonable at the time, under all the circumstances . . . ." *Id.* at 529. The PSC's blanket rule circumvents

those requirements, and in particular deprives UE of the presumption that its management decisions were reasonable in utilizing Ameren Services. It also deprives UE of the ability to fully and fairly adjudicate any claim that its decisions were unreasonable. That deprivation is beyond the PSC's jurisdiction and authority, no matter how strenuously the PSC wishes to argue that the Rules are a "good idea" or "easier to administer" or "more efficient." "[N]either convenience, expediency, or necessity are proper matters for consideration in determination of whether or not an act of the commission is authorized by the statute." *Utility Consumers Council*, 585 S.W.2d at 49 (*citing Kansas City v. Public Service Commission*, 257 S.W.2d 462 (Mo. banc. 1923)). Furthermore, the Legislature, not the PSC and not the courts, must determine if a different manner of regulation is warranted: "'[i]t is not up to this court to strike the appropriate balance between public participation and simplicity in rate proceedings. That determination is for the legislature.'" *Id.* at 50 (*quoting with approval Wisconsin's Environmental Decade*, 260 N.W.2d at 715).

III. THE PSC ERRED IN ISSUING THE ORDERS THAT CREATED THE RULES BECAUSE THE PROCESS FOLLOWED IN ISSUING THE ORDERS AND THE RESULTING RULES VIOLATED MO. REV. STAT. § 386.250(6) IN THAT APPELLANTS, AS AFFECTED PARTIES, WERE DENIED THE RIGHT TO PRESENT EVIDENCE AND TO CROSS-EXAMINE AND REBUT OPPOSING WITNESSES AT AN EVIDENTIARY HEARING.

STANDARD OF REVIEW

The standard of review applicable to this Point III is the same as that provided for in connection with Point II, *supra*.

A. The PSC Law defines the process that is required when the PSC exercises its rulemaking authority.

As discussed in Point I of this Brief, the comprehensive and total nature of the PSC Law as it applies to regulation of public utilities is well established. It pre-dated the MAPA, and contains many provisions that are unique to utility regulation. Sections 386.500 *et seq.* are prime examples of provisions unique to the PSC Law, and their existence demonstrates that the MAPA is not the final word in determining the process applicable to PSC rulemaking proceedings.

Like Sections 386.500 *et seq.*, Section 386.250(6) prescribes a process in PSC rulemakings that is different from the minimal process that would apply if the requirements of the MAPA stood alone. The MAPA merely fills gaps in administrative process. *Noranda*, 24 S.W.3d at 245. It does not supplant agency enabling statutes and processes when those statutes apply. *Wenzel*, 59 S.W.3d at 4-5. The agency's enabling statute can augment the minimum requirements of the MAPA. *See* A. Neely, *Administrative Practice and Procedure* § 5.02 (2d ed. 1995) (where Professor Neely notes that agency statutes may augment the minimal requirements of the MAPA). As the statutory language below demonstrates, the process prescribed by Section 386.250(6)

goes well beyond the mere "public hearing" allowed by the PSC with respect to the Orders at issue in this appeal.

Section 386.250(6) provides that rules can only be adopted after a hearing "at which *affected parties* may *present evidence* as to the reasonableness of [the] proposed rule[s]" (emphasis added). Section 386.250(6) further provides that such rules must be "supported by evidence as to reasonableness." When construing a statute, courts must determine the intent of the Legislature and in so doing must give every word, clause, and sentence meaning. *See, e.g., Brown Group, Inc. v. Administrative Hearing Commission*, 649 S.W.2d 874, 881 (Mo. banc. 1983).

The term "evidence" means "competent evidence heard under circumstances affording the adverse party, for the protection of his rights, those safeguards the law guarantees, *including an opportunity for cross-examining the witness heard as well as the introduction of evidence in his own behalf." State ex rel. Kansas City Public Service Co. v. Waltner*, 169 S.W.2d 697, 703 (Mo. 1943) (emphasis added). The "affected parties" (which certainly include Appellants) were denied the right to present evidence. (L.F. 443; 446); (Tr. 2). All that was allowed were written "comments" (amounting essentially to "white papers" discussing issues of policy) and oral "statements" at the public hearings held by the PSC in September 1999. (*See, e.g.*, L.F. 38; 85; 105); (Tr. 2).

When the Legislature intends for an agency to merely hold a "public hearing" in rulemakings, the Legislature has said so, as illustrated by numerous other Missouri statutes. *See* A. Neely, *Administrative Practice and Procedure* § 6.39 at 152. In his

treatise, Professor Neely cites 12 separate Missouri statutes where a mere "public hearing" is required in rulemakings. None of those statutes, however, include the affirmative requirements contained in Section 386.250(6) that require that the PSC allow "affected parties" to "present evidence." Because this Court must give effect to the language chosen by the legislature, it is clear that the legislature intends a process beyond the mere "public hearings" called for in numerous other statutes as evidenced by the legislature's choice of words. This Court must give effect to the fact that the legislature provided that *affected parties* must be allowed to *present evidence*.

B. <u>The longstanding history behind the requirements of Section 386.250(6) demonstrates that the PSC should have allowed Appellants to cross-examine witnesses prior to adoption of the Rules</u>.

In 1979, the Public Counsel properly and successfully argued that cross-examination of witnesses in PSC rulemaking proceedings is required under Section 386.250(6). As a result of the Public Counsel's efforts, the Circuit Court of Cole County issued its writ of prohibition requiring the PSC to permit cross-examination in the PSC's rulemaking proceeding. *See* App. G hereto. In describing these efforts in its biannual report, the Public Counsel stated as follows:

> The Public Counsel made a formal request to cross-examine witnesses at a hearing on October 1, 1979. In support of that request, he submitted a memorandum of law which argued that the P.S.C.'s own rules allow cross-examination at any hearing, 4 CSR 240-2.130(1)(B). Secondly, the

> Commission was proceeding under Section 386.250(11)[19] R.S.Mo. 1978, which provided that a hearing had to be held prior to making a rule relating to utility connections, billing and conditions of rendering public utility service. The hearing requirement meant that these proceedings fell within the definition of a "contested case" in Section 536.020 R.S.Mo. 1978. Third, the requirement for a hearing, in conjunction with the provisions of Article V, Section 18 of the Missouri Constitution, meant that the P.S.C.'s decision must be supported by competent and substantial evidence, which meant evidence subject to cross-examination.

See App. H hereto.

The Public Counsel got it right 22 years ago. The PSC must follow the PSC Law and cannot simply ignore it just because its proceedings are, in part, governed by the minimal procedural provisions of the MAPA. In the case of the PSC rulemakings, those minimal processes are augmented by specific provisions of the PSC law.

CONCLUSION

The courts have jurisdiction over this appeal as prescribed by the statutory judicial review process contained in the PSC Law. The Commission is without jurisdiction to

[19] As previously noted, in 1979, what is now Section 386.250(6) was numbered as Section 386.250(11). The pertinent provisions of both statutes, with respect to the requirements that affected parties are entitled to present evidence and that the rules must be supported by evidence of reasonableness, remain unchanged.

control and manage utility expenditures, including those relating to transactions with their affiliates, via a blanket rule. Rather, if the Commission believes the utility's expenditures are unreasonable or that management has abused its discretion, the Commission must adjudicate facts that support that belief under Section 393.140(5). Since the Commission failed to do so, the asymmetrical pricing standards which it adopted in 4 C.S.R. 240-20.015(2)(A), 240-40.015(2)(A), 240-40.016(3)(A), and 240-80.015(2)(A) are void and should be ordered stricken from the Rules.

Finally, the Commission failed, as required by law, to afford affected parties their right to present evidence (including the right to cross-examine) as to the Rules, thereby rendering the entire rulemakings and the Orders unlawful and void. Appellants therefore ask this Court enter its order declaring the Orders and the Rules issued thereby void.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a printed copy of the foregoing Brief of Appellants Ameren Corporation and Union Electric Company, d/b/a AmerenUE and a copy of said Brief on disk were served on May 13, 2002, via United States mail on the following counsel:

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CERTIFICATE PURSUANT TO RULE 84.06(c) AND 84.06(g)

I hereby certify that the foregoing Brief of Appellants Ameren Corporation and Union Electric Company d/b/a AmerenUE complies with the limitations contained in Rule 84.06(b) and, according to the word count of the word-processing system used to prepare the Brief (excepting therefrom the cover, certificate of service, this certificate, and the signature block and the appendix), contains 15,923 words. I hereby further certify that the disk containing this Brief and submitted to the Court has been scanned for viruses and that the scan indicated that it is virus free.

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